BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER,
Petitioners,

v.

ALMA CHAMBERS, as Executrix of the Estate of Henry C. Yeiser, Jr., as owner of the American Yacht, *Friendship II,*
Respondent.

BRIEF FOR RESPONDENT.

RAYMOND PARMER,
VERNON S. JONES,
New York City,
Proctors for Respondent.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

BLANK PAGE

INDEX.

Cases Cited.

Authorities.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER,

Petitioners,

v.

ALMA CHAMBERS, as Executrix of the Estate of Henry C. Yeiser, Jr., as owner of the American Yacht, *Friendship II*,

Respondent.

BRIEF FOR RESPONDENT.

In this case there are two important questions. One is whether a maritime cause of action *in personam*, in addition to a cause of action *in rem*, survives against the executrix of a deceased tort feasor. The other is whether there ever was a cause of action to begin with.

In the brief which the respondent submitted in opposition to certiorari respondent said that, in view of the power of the court as set forth in *Langnes* v. *Green*, 282 U. S. 531, 535-539, respondent would be entitled, should certiorari be granted, "to urge the court to go beyond the narrow question of how much damages the petitioners may have and to decide whether they should have any at all." Brief, p. 4. Particular reference was made to the two issues of law

underlying this question, which were decided against the respondent in the courts below.

When certiorari was granted in this case the Supreme Court did not say that the only question which would be considered was whether a maritime cause of action *in personam* survives. Therefore, respondent now urges the court to exercise its full power and to decide, first, whether there was any liability at all, and then, if it should decide that there was liability, whether that liability survived against the executor of the tort feasor or was limited to the vessel and its value.

POINT I.

THE DECEASED SHIP OWNER WAS NOT LIABLE AS A MATTER OF LAW.

Stripped to its essentials, the petitioners' case was, first, that, while they were on the vessel of the deceased ship owner, they were his social guests, second, that they were injuriously affected by motor fumes which came from holes in the vessel's exhaust pipe, third that the deceased host owed them a duty, and, fourth, that he did not perform it.

Obviously, a failure in respect of any one of these parts of the petitioners' case should have been fatal.

Respondent's contention, with regard to these matters, is as follows: First, the petitioners proved that they were social guests of the ship owner. Second, there was not any proof at all that the petitioners were affected by motor fumes. Third, the deceased ship owner did owe the petitioners a duty, but it was not the duty which the courts below said he owed. Fourth, there was not any proof of a failure on his part to perform either the duty which he actually had or the duty which the courts below said he had.

With regard to the matter of motor fumes and their effect on the petitioners, the District Court found as follows (R. 830):

> "Shortly before the boat reached Miami the claimants were discovered in an unconscious condition. The door to the bathroom was open but the windows in their stateroom and in the private bath opening into the stateroom were closed. While they were asleep in the stateroom which had been assigned to them, they were overcome, rendered unconscious and injuriously affected by carbon monoxide gas which had been permitted to escape from holes in the exhaust pipes into the stateroom."

The Circuit Court of Appeals, with regard to these findings, said (R. 864):

> "The District Judge found that carbon monoxide gas in the form of exhaust fumes which were escaping from the pipes collected in the bilge and, passing through the vents into the stateroom, overcame the appellees while they were asleep and were the proximate cause of the injuries complained of. These findings were based on the oral testimony of the witnesses taken in open court. The District Judge had the opportunity which we do not have of facing each witness and of judging at first hand the weight of what he had to say. Every finding of fact which the judge made is supported by evidence. Where there is a conflict of evidence we are not in position to say that the appellees' evidence is unworthy of belief."

In view of the remarks of the Circuit Court with respect to the limitations on its power to weigh testimony it is necessary to say that respondent did not in that court, and does not in this, ask that the evidence be weighed. The re-

spondent's contention in the Circuit Court, as it is here, was that there was not any evidence at all to support the essential finding of fact that the petitioners were affected by motor fumes, and that the Circuit was wrong in holding otherwise. This raises a legal question.

A. There was not any proof that petitioners were affected by motor fumes.

No one testified at the trial that he saw or smelled any motor fumes in the room in which the petitioners were found unconscious or at any place on the vessel. The petitioners did not so testify. They did not testify at all. They were not even present at the trial. Neither did any member of the crew, and all of them were called, say that he saw or smelled motor fumes in the room. Neither did Mr. McKay, who was also a guest and was the only witness called on behalf of the petitioners to prove what happened on the vessel. Indeed, Mr. McKay, who discovered the petitioners unconscious in their room, where they had been sleeping with all windows closed and the door shut, opened the door and remained in the room for two or three minutes before he opened the windows. During all of this time he did not notice any unusual or peculiar odor. Specifically, he did not notice any smoke or exhaust fumes, R. 116, 118, 64, 65.

During all of this time the vessel's engines were operating and, if motor fumes had been entering the cabin previous to Mr. McKay's entry therein, there was no reason why they should not have continued doing so while he was there. R. 621, 691, 692. Furthermore, if motor fumes had been entering the room before Mr. McKay's coming there, there is no reason why they should not have collected there in volume. With the windows closed and the door to the

alleyway closed there was no way in which they could escape. Indeed, the petitioners' claim that they were made unconscious by motor fumes necessarily rests on a claim that motor fumes did collect in the room in such appreciable volume as to enable one of their component parts, carbon monoxide, to cause unconsciousness. Yet Mr. McKay said that he did not see nor smell any motor fumes at all. Moreover, McKay was not a casual observer. He and Yeiser sniffed the air in the room. McKay thought it lacking in oxygen. But neither he nor Yeiser saw nor smelled anything which was foreign to normal atmosphere. R. 104, 116, 117.

In this day and age one does not have to describe the odor and appearance of motor fumes. Most persons have been close enough to the exhaust of an automobile to know that motor fumes are not only objectionable, but, in volume, repelling.

In view of the above, therefore, the finding of the District Court was and is repugnant to common sense.

No physician made any tests by reason of which he was able to say or did say that petitioners had suffered carbon monoxide gas poisoning. No physician said that, solely as a result of the symptoms which he found on examination, he was of the opinion that either of the petitioners had suffered from carbon monoxide gas poisoning.

With regard to one of the petitioners, Miss Gruner, no physician said anything at all with respect to the cause or the nature of her condition. She seems to have been forgotten. With respect to Mrs. Just, the other petitioner, each physician who testified, and there were three, was of the opinion that if, as they had been told, she had been exposed to motor fumes, then the condition in which they found her on examination could have been caused by such exposure. R. 354, 263, 229, 231-233, 184, 225, 719. One of

them, believing what he had been told, was of opinion that Mrs. Just had been affected by carbon monoxide gas. R. 184.

But two of the three physicians who examined Mrs. Just, and testified at the trial, were not satisfied that she had been affected by carbon monoxide gas. Dr. Howell, who was the sole physician in charge during the hours she remained on the vessel after it docked, was suspicious of the history of exposure to motor fumes. He suspected alcoholism and treated the case accordingly when he brought her to a hospital. R. 263, 264, 265. However, he recorded the case in the hospital records not in terms of alcoholism but in terms of the history of exposure to motor fumes, which he had received. Exhibits 9A, 9L. He did this in order to protect Mrs. Just's good name. R. 269. Another physician, Dr. Harris, specifically recorded in the hospital record that a diagnosis of carbon monoxide poisoning was likely "in view of the history" Exhibit 9L. On the trial he declined to say that the diagnosis had been confirmed. He preferred to say that carbon monoxide was "suspected." R. 719. And he would go no further even though he had been given a history of exposure to motor fumes.

Obviously, the District Court could not draw from the testimony of any of the physicians an inference that the petitioners had been affected by motor fumes or carbon monoxide gas. The physicians, themselves, did not express an opinion which was independent of the history which was given to them. Their opinion stands or falls on the truth of that history, and if, as a fact, the petitioners were not exposed to motor fumes, the opinions of the physicians could not have been of assistance to the court.

The theory that the petitioners had been exposed to motor fumes originated in the minds of Yeiser, the deceased ship owner, and Mr. McKay, before the vessel reached the

dock. They were trying to explain to each other the petitioners' unconsciousness and concluded that it was caused by carbon monoxide gas. R. 66-69. Yeiser not only expressed that opinion to McKay but later on he so informed Dr. Howell, who was called to treat the petitioners. R. 70. The physician acted accordingly. R. 300, 304, 354. And Dr. Howell passed this history on to other physicians. R. 190, 718.

But the District Court could not have drawn from Yeiser's expression of opinion an inference as to the fact. The testimony with respect to what Yeiser said was not received for such a purpose. When offered as an admission objection was made and the court said that it thought "an admission against interest ought to be on facts and not an opinion. R. 68."

Accordingly, when counsel for the petitioners reframed his question to ask whether the ship owner made "any expression at this time as a part of what was going on there as to what was the cause of this illness" counsel for respondent said that there was no objection. The question as reframed was clearly directed to bringing out only the surrounding circumstances. R. 68.

And it is precisely in showing the surrounding circumstances that Yeiser's expression of opinion was of value. It showed the origin of the theory, never supported by any evidence at all, that the petitioners had been exposed to motor fumes.

It may well be wondered how Yeiser and McKay could have formed an opinion that the petitioners had been exposed to motor fumes if, when they sniffed the atmosphere of the room, they neither saw nor smelled any. So far as McKay is concerned, the explanation is clear from his testimony on the stand. He was smelling for pure carbon monoxide gas, which he understood to be and which is

a colorless and odorless substance. R. 87, 115. It did not occur to him, until he was confronted with the fact on the trial, that the carbon monoxide gas for which he had been sniffing could only be a component of a larger mass of motor fumes. R. 116. If they had been present he could not have missed them.

McKay, therefore, or anyone else who was trying to discover an odorless and colorless gas, might be excused for believing that it was present even though he could not detect it. And, so believing, such a person might so inform a physician. On the undisputed evidence, that is exactly what happened.

The District Court, therefore, had a case where all that appeared was that two women were found unconscious in their beds. There were holes in an exhaust pipe which passed through the bilge beneath their room. There was evidence that motor fumes, which might escape from the hole, could, by reason of the ship's construction, enter the room. But there was nothing to show that they did. Because the court was not satisfied that the unconsciousness was due to alcoholism, and no other explanation of it was given,* the court, as the opinion shows, found that motor fumes did enter the room. R. 819. The court also relied on the fact that on board the ship both petitioners and, in the hospital, one of them, was treated as if they were suffering from gas poisoning. R. 819. That, indeed, was no reason at all. If there was error in so doing, the District Court merely perpetuated that error.

The petitioners when found in their beds and thereafter did not have the characteristic appearance of persons who have suffered unconsciousness from carbon monoxide poisoning. The skin of such persons is red. Petitioners

---

* The ladies never gave any testimony.

were pale and their lips were blue (R. 815, 816, 359, 255, 253, 184).

The burden was on the petitioners to prove the cause of their condition. If alcohol was not the cause, as the court found, it did not follow that motor fumes were. In view of the fact that there were no motor fumes detected in the room by those who could not have failed to detect them had they been there, the conclusion is inevitable that the unconsciousness must have been caused by something else. What that was it was for the petitioners to show. They did not help matters by not attending the trial.

B. The Deceased Ship Owner had a Duty to Petitioners but it was not the Duty which the Courts Below Imposed on Him.

Both courts have held that Yeiser had a duty to know and realize that the petitioners were subject to a danger of being exposed to the carbon monoxide gas by which, according to the finding, they were affected. R. 821, 865. If the duty which a maritime host owes a social guest is the same as that which an occupier of premises owes a business visitor at common law, the courts below were correct. On the other hand, if the duty which a maritime host owes a social guest is the equivalent of that which a host owes a guest at common law, both courts were wrong.

An occupier of premises at common law owes a business visitor a duty not only to remedy defects in premises but to discover and to warn the visitor against them as well. A host, at common law, does not owe his social guest a duty to discover defects in the premises. His duty extends only insofar as he has actual knowledge. He is not bound to know or, what is the same thing, discover. But, if he does know of a danger, he must warn his guest.

American Law Institute's Restatement of the Law of *Torts*, Volume 2, §§ 331, 332, 341 and 342; *Higgins* v. *Mason*, 255 N. Y. 104; *Galbraith* v. *Busch*, 267 N. Y. 230; *O'Shea* v. *Lavoy*, 175 Wis. 456; *Sommerfield* v. *Flury*, 198 Wis. 163; *Petteys* v. *Leith*, 62 So. Dak. 149; *Marple* v. *Haddad*, 103 W. Va. 508; *Howe* v. *Little*, 182 Ark. 1083; *Shrigley* v. *Pierson*, 189 Ark. 386; *Coppedge* v. *Blackburn*, 15 Tenn. App. 587; *Boggs* v. *Plybon*, 157 Va. 30; *Liggett & Meyers Tobacco Co.* v. *DeParcq*, 66 F. (2d) 678; *Ingerick* v. *Mess*, 63 F. (2d) 233; *Hewlett* v. *Schadel*, 68 F. (2d) 502.

The maritime law appears to be the equivalent of the common law with respect to the duty owed by a host to a social guest. It was so recognized in the *Blue Moon III*, 60 F. (2d) 653, by the United States District Court for the Western District of New York sitting in Admiralty.

C. There was no Proof of a Failure to Perform Either the Duty which the Deceased Ship Owner had or the Duty which the Courts Below Imposed on Him.

It is fundamental that if a person knows of a danger, he has a duty to give a warning to his business visitors or his social guests. The duty of knowing which an occupier of premises owes to a business visitor carries with it a duty to warn. The duty in that case is to know and warn.

Both courts below said that Yeiser owed a duty to the petitioners to warn them of the danger to which they were subjected, and that there was a failure on his part to warn them. Under familiar principles this finding was vital, for if the petitioners knew as much about the danger as Yeiser knew, or was supposed to know, and chose to remain on board the vessel, they could not recover.

Moreover the district court held properly that the burden was on the petitioners to prove that Yeiser failed to warn them, or that they were not warned by somebody.

However, the manner in which the courts arrived at the conclusion that Yeiser failed to warn the petitioners, or that the petitioners were not warned by someone else, or in some other way, is beyond discovery. Neither of the petitioners testified. Yeiser was dead. No-one else could or did give competent evidence on the point. There is a total failure of proof that the petitioners were not warned about the room.

This failure of proof is not technical merely. No-one can tell just how much the petitioners knew or did not know unless they hear it from their own lips. It is idle to presume that they would not have taken a risk had they known what it was. The law of torts is founded on injuries produced by risks taken both by *tort feasors* and injured persons. Unless we are to abandon the normal requirements that each person who claims that another is responsible to him for personal injuries shall prove the essentials of his case, it follows that, when the petitioners failed to prove that they had not been warned, which it was their burden to prove, the decree should have gone against them for that reason alone.

It should not be forgotten that the case below involved the estate of a dead man. Ordinarily, the law protects executors by requiring strict proof. Here, not even the ordinary requirements were observed.

Furthermore, there was no proof that Yeiser knew that there were holes in the pipe at the time that the petitioners were on board the vessel. It was not contended below, and it was not found, that he did have such knowledge. But both courts have held that he should have known it. R. 821, 865.

Constructive knowledge is not the same as actual knowledge, and, where a rule of law stipulates that the knowledge must be actual, it is erroneous to substitute for such knowl-

edge constructive knowledge. Therein lies an error but for which the decree below necessarily would have been different.

In *Higgins* v. *Mason*, 255 N. Y. 104, a guest of the owner was killed while riding with the owner in the latter's automobile. The death was caused by a mechanical defect in the car which caused it to turn over while being operated. The owner had no knowledge of the existence of the mechanical defect. Although he knew there was something wrong with the car he did not know what it was. It was held that there was no liability. The court said, page 110:

> "Under the authorities, the defendant host, George Mason, was not liable for the death of his guest, Robert Higgins, because of a mechanical defect in his car, although Mason, by inspection, might have discovered the fault, since Higgins, in accepting the invitation to ride, must have taken the car as he found it and no duty of inspection rested upon Mason. Mason would be liable only if he *knew* of the dangerous condition; *realized* that it involved an unreasonable risk; *believed* that the guests would not discover the condition or realize the risk; and failed to warn them of the condition and the risk involved. Does the record show that these conditions, upon which liability depends, have been complied with?"

At page 111, it said:

> "Even if Mason knew that something was wrong with the car, that it was 'logy' on hills, that it did not steer well, this was far from being realization of the fact that a serious mechanical defect, making further travel dangerous, was involved. Mason's own conduct in exposing his wife and himself to the peril of traveling farther in the car indicates that he was not conscious of the peril. If Mason thought

the car safe for himself he could not have realized that it was unsafe for his guests."

This case states the common law rule explicity. Whether the maritime rule is the same is for this court, in the last instance, to decide. If it is the same, the decree below is wrong because on the facts the above cited case is not distinguishable from the case at bar.

If, on the other hand, it be assumed that the courts below were correct in holding that the deceased host had a duty to discover the defective condition of his premises, there was not any proof to support the court's conclusion that he was negligent in not discovering it. As may be seen on examination, the court's conclusion in this respect was derived from false premises and false reasoning.

The Circuit Court of Appeals assumed and said that Yeiser had been told at the time he purchased the vessel that the port exhaust pipe should be renewed. R. 865. This was not true. The evidence and the findings of fact show that, five weeks before he purchased the vessel, he was informed, not only that the pipe should be renewed but "among other things," that it might be repaired, R. 827, 730. The duty was not on him, while the vessel was still owned by someone else, either to renew or repair the pipe, and there is nothing in the evidence or the findings of fact to show that the exhaust pipe was not satisfactorily and safely repaired at the time that Yeiser became the owner. It might be inferred that, knowing that repairs were necessary, he would insist that they be made before he took title.

Yeiser became the owner in May 1934. R. 827. The petitioners were on the vessel on March 1, 1936. There was no evidence and no finding below that when Yeiser bought the vessel the exhaust pipes were defective. There was no finding below that there were holes or defects in the exhaust

pipe at any time during the period of Yeiser's ownership, except at the time that the petitioners were on board and "for a long time prior thereto." R. 831. And there was no evidence as to how long they had existed "prior thereto." Moreover, the District Court did not say how long they had existed, because of this absence of evidence.

And yet both courts have held that Yeiser could and should have known in September 1935 of a defect in the pipe which the courts themselves, after hearing all the evidence, could not and did not say existed in the pipe at that time or any other time in particular before March 1, 1936.

On the one hand, it was admitted that Yeiser knew that motor fumes could and had entered the interior of the vessel on other occasions, the last time being in September 1935 when they affected one of his sons. Both courts took this admission and coupled it with what Yeiser had been told with respect to the condition of the exhaust pipe when the former owner had it. They concluded that the two circumstances were enough to make him suspect the exhaust pipe rather than the natural phenomenon of gases being blown occasionally into the vessel after being exhausted in the normal manner at the stern. R. 820, 821, 865. From this they found that he was required to make an inspection thorough enough to discover a defect in the pipe if one was there. Therefore, he was negligent in attributing the presence of motor fumes to natural causes.

The vice of this reasoning is that it assumes that the pipe was defective in September 1935 and then blames Yeiser for not discovering it at that time. The truth is that there was no evidence and the District Court did not find that the pipe was defective in September 1935. Unless it was defective at that time Yeiser could not have discovered a defect by the most thorough inspection. And it was wrong to hold that he should have discovered a defect, and

that the inspection which he did make was inadequate, when the District Court was unable to find and did not find that a defect existed.

All that the District Court could and did find with respect to the condition of the pipe as of September 1935 is that there was a possibility of a defect. R. 820, 828. Obviously, it is absurd to hold a person negligent for not discovering a defect which was only possible but which did not actually exist.

Furthermore, the coupling of what Yeiser had been told before he bought the vessel with his experience of September, 1935 led the District Court, if not the Circuit Court, into an even more glaring error. It was said that he had actual knowledge that the stateroom *per se* was a dangerous place because motor fumes had entered it and that he was guilty of active negligence in assigning this stateroom to the petitioners. R. 829. From this it was concluded that he was responsible for what happened to the petitioners while they were in it. R. 831. Again, this assumes, without warrant, that there was a hole in the pipe in 1935. True, Yeiser knew that the room could become dangerous if motor fumes entered it. True, he knew that motor fumes could enter it. But it is false reasoning to hold that he was negligent in not acting with reference to holes in an exhaust pipe which, for all that was found below, did not exist. In the light of what appeared to him to be the fact, and in the light of what must be taken to be the fact according to the findings of the courts below, Yeiser guarded against the only danger which existed, namely, the danger of fumes coming in from the outside through open windows. He ordered that the windows be closed whenever the cabin was occupied and the motors were running. R. 435. Thus, when the petitioners were found unconscious in their beds, all of the windows were closed.

If, in spite of this, the petitioners were affected by motor fumes, which they were not, they could have come only from a leaky exhaust pipe. But that was not something of which Yeiser can be held responsible, on the reasoning below, unless, in the first place, it is found that it was leaking or defective at a certain time and, in the second place, that at that time something occurred to put him on notice.

POINT II.

THE CAUSE OF ACTION, IF ANY, DID NOT SURVIVE AGAINST THE EXECUTOR OF THE TORT FEASOR'S ESTATE.

Respondent has already set forth in the brief submitted in opposition to certiorari the principal points of its argument on this branch of the case. In order to avoid repetition, and in conformity with the practice which, we are informed, has been adopted by petitioners, we shall rely principally on the brief already filed. This brief, therefore, so far as concerns the above point, will be supplemental.

It is clear that the argument of the petitioners assumes that the maxim *"actio personalis moritur cum persona"* is responsible not only for the abatement of causes of action for personal injuries but also for the absence at common law of a cause of action for the death of a human being.

This false notion is responsible for much of what appears in petitioners' supplemental brief. It is responsible for the statement on page 9 that the abatement of causes of action for personal injury "has never been peculiar to the maritime law as administered by nations generally", and for the statement, also on page 9, that the rule with respect to abatement had its origin in England in the Latin maxim. It is responsible also for the reference on page 9

to the cases of *The Seagull* and *The Highland Light*, which were cases of wrongful death. Petitioners say that those cases held that the common law with respect to the abatement of causes of action was not applicable in admiralty. It is also responsible for the reference to the *Harrisburg*, 119 U. S. 199, on pp. 9 and 10, and to *The Corsair*, 145 U. S. 335, on pp. 10 and 11. These were cases where suit was brought to recover for a death. The petitioners, however, cite them as illustrative of a rule with respect to the survival of causes of action for personal injury. Finally, after citing several other cases, all involving actions to recover for the death of a human being, the petitioners say, on page 14:

> "It seems clear from these decisions that as to the question whether or not a cause of action survives the death of the injured person or the tort feasor, there is no rule that belongs especially to the maritime law as such."

And at page 15:

> "This explains why in *The Harrisburg*, this court first held that insofar as the rule '*actio personalis moritur cum persona*' is concerned, each country followed the same rule for the sea as it did on land, and thereupon followed the common law in the absence of a state statute to the contrary."

The rule "*actio personalis moritur cum persona*" was not even mentioned in *The Harrisburg*, except as a quotation from the opinion in another case.

Having assumed that the rule of the common law with respect to the abatement of actions for personal injury on the death of the injured party or of the tort feasor was responsible for the non-existence at common law of a cause of action for death, petitioners reason that the effect of modern death statutes has been to change the ancient rule

with respect to the abatement of causes of action. The conclusion is as false as the premise.

However, in order to demonstrate the falsity of the premise it is necessary to delve more deeply into legal history than the petitioners seem to have done if one regards only their supplemental brief.

It will be necessary to understand clearly, first, the reason why there was no cause of action for the death of a human being at common law, and, second, why causes of action for personal injury did not survive at common law either to the executor of the injured party or against the executor of the tort feasor. And, since the maritime principle was derived not from the common law but from the civil law, it will be necessary to understand what the civil law was as well.

It will be found that both in the civil law and at common law the absence of a cause of action for the death of a human being was not in any way connected with the abatement of causes of action for personal injury. In both systems they were distinct matters, and only a confusion of thought can associate one with the other.

A. Common law—Death of a human being.

At common law "the death of a human being cannot be complained of as an injury." This was said and held by Lord Ellenborough in *Baker* v. *Bolton*, (1808), 1 Campbell 493, 170 Eng. Rep. 1033.

It has never been doubted that this was a correct statement of the law. Any controversy which has been evoked by it has been based on a contention that it should not apply to cases where the plaintiff had a legal right to the services or society of another, and the damages consisted of cutting off that right by killing him. The only such cases known to the law are those based on status and arising from the

relationship of father and children, husband and wife and master and servant.

The case of *Baker* v. *Bolton* was a case where a husband sued for the loss of the society of his wife, who died as a result of an alleged tort. Because of the application of the general principle announced by Lord Ellenborough to such a case many legal writers have criticized the opinion. Among them are Holdsworth, who, in his History of English Law, Volume 3, p. 334, points out that the result in *Baker* v. *Bolton* was caused by a misapplication of the maxim *"actio personalis moritur cum persona"*, which, in fact, had nothing to do with the matter.

But neither that learned author nor any other has seriously contended that at common law there was any right on the part of a person, who was neither father, husband or master, to recover for the death of a human being.

This void in the common law was not the result of any positive common law rule. Still less was it the result of the extinction of an existing cause of action. A cause of action for the death of a human being simply was not within the conception of the common law.

The death of a human being at common law was regarded as a criminal matter. It was not of civil cognizance. Even accidental killings were criminal, and the damage was conceived as being done to the community and not to the person.

As Gustavus Hay, Jr. points out in Death as a Civil Cause of Action in Massachusetts, 7 Harvard Law Review, 170, p. 173, this had the force of a moral idea and expressed the sacredness of human life. Hay also explains that there were two good reasons for the non-existence of a tortious cause of action for death. In the first place, the killing of a man, whether by intent or through negligence, was a felony, and all the prisoner's goods there-

fore belonged to the Crown. In the second place, there was a quasi civil remedy provided by a statute, by reason of which the heir or widow of the deceased could, when the Crown did not insist on attainder, blackmail the tort feasor-criminal into a settlement. This was the action of appeal.

This statutory action continued in the law of England down to 1819, when it was abolished by statute as a result of the famous case of *Ashford* v. *Thornton,* 1 Barn. & Ald. 405.

Of this situation at common law Lord Sumner, speaking for the House of Lords in 1916, said in *Admiralty Commissioners* v. *Steamship America,* 1917 A. C. 38, at 59:

> "There never was an action to recover damages for the death of a human being in the sense now contended for, and the remedy by appeal which so long persisted in the case of the widow, the most crying case of all, was one which the most hardened formalist would not have tolerated had any such action at law been possible, for it was long a form of legalized blackmail."

Furthermore, Lord Sumner went on to explain, at page 60, that although the absence of a cause of action for death at common law had often been classified under the maxim *"actio personalis moritur cum persona"* such maxim was irrelevant to the matter in hand.

B. Common Law—Survival of Actions.

At an early period of the common law not only actions for personal injury, but many other actions, did not survive either to executors of the injured party or against the executors of the tort feasor. This was not by reason of the application of the maxim *"actio personalis moritur cum persona"*. The maxim did not exist.

As explained by Holdsworth, *supra,* Vol. 3, p. 576, the maxim in its modern shape did not put in its appearance until 1609. And yet the notion that actions of various kinds did not survive either to or against heirs had been embedded in the common law from the time of Bracton. Goudy, in Two Ancient Brocards, in Essays in Legal History, Ed. by Vinogradoff, gives it as his opinion, at page 227, that the rule respecting the abatement of existing causes of action came into the common law by reason of a "misunderstanding by Bracton of the Roman law, his inaccurate use of its language, and the consequently erroneous doctrine adopted by Fitzherbert and others."

Therefore, the maxim *"actio personalis moritur cum persona"*, which has been criticized by so many of the learned as harsh and unjust, is not the foundation of the common law rule. It is rather the convenient method for referring to a legal principle almost as ancient as recorded history.

As Holdsworth points out, *supra,* pages 578-583, the development of the English common law through the years resulted in gradually excepting many causes of action from the generality of the maxim's language. However, causes of action for personal injury have never been excepted. They never survived either to or against executors.

C. Civil Law—Death of a Human Being.

In the civil law, as at common law, there was no civil action for the death of a human being. Buckland & McNair Roman Law and Common Law, page 336.

The Roman maxim was not *"actio personalis moritur cum persona"*. It was *"Liberum corpus nullam recipit aestimationem"*. Goudy, *supra,* page 218. Freely translated, this meant that human life can not be evaluated in terms of money.

The civil law in this matter is also set forth in *Hubgh* v. *The New Orleans & Carollton Railroad,* 6 La. Ann. 495.

D. Civil Law—Survival of Actions.

In the civil law it was well established that causes of action for personal injury did not survive either to the heirs of the injured person or against the heirs of the tort feasor. The Institutes of Justinian, translated by W. Grapel, London, 1855, Book 4, Title 12, reads as follows:

> "For, it is a settled rule of law that actions which involve damages and spring from malfeasance, are not competent against the heir of the defendant; such, for example, is the case in actions of theft, of robbery, of injury to persons, and of wilful damage. Heirs are, however, competent to bring such actions; and such competency is never denied save in actions of injury to persons, and in some others of like nature."

The civil law in this matter is also set forth in *Edwards* v. *Ricks,* 30 La. Ann. 926.

It is well known that the situation as it existed both at common law and in the civil law has been affected by statute.

In England, Lord Campbell's Act was passed in 1846, twenty-seven years after the passage of the statute which had abolished the action of appeal. In its preamble it recited that:

> "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of any person,"

This statute, therefore, filled the absolute void with respect to causes of action for the death of a human being

which had existed in the English common law for twenty-seven years. It did not affect the rule whereby causes of action did not survive to executors of the injured person or against executors of a deceased person. Such a statute was not passed in England until 1934. 48 Harv. Law Review 1009.

In the United States the legal situation at common law was met by the passage of statutes in all of the states. For the most part these were patterned after Lord Campbell's Act. Of those which were not patterned after Lord Campbell's Act all except a few gave a new cause of action for death as distinguished from a revival of an old cause of action for personal injuries. Several, as in the case of Iowa and Tennessee, in terms provided only for the survival of an existing cause of action. Code of Iowa, 1939, ch. 484, §§10957, 10958; Tennessee Code of 1938 (Michie), Art. 1, §§8693, 8694, 8236. But the courts and the legislature, observing that this did not provide satisfactorily for the widow, have provided that damages may be awarded which the deceased in his lifetime could not have obtained. *Chicago, etc. R. Co.* v. *Ponds,* 79 Tenn. 127, 129; Tennessee Code of 1938, Art. 1, §8240; *Boyle* v. *Berenholtz,* 224 Ia. 90; *Hough* v. *Ill. Cent. R. R. Co.,* 169 Ia. 224; *Lane* v. *Steiniger,* 174 Ia. 317; *Seney* v. *Chic., M. & St. P. R. Co.,* 125 Ia. 290. Substantially, therefore, all of the states have created a new cause of action for the death of a human being where there was none before.

This court expressed the essential distinction between a death act and a survival act in *Vancouver Steamship Co.* v. *Rice,* 288 U. S. 445, at 447, where it was said:

> "The libel alleges no cause of action that accrued to the deceased. The only cause of action here involved is that created by the Oregon Statute, and it did not arise until the intestate died."

The legislation of the states with respect to the survival of causes of action, including those for personal injury, both to the executors of injured parties and against those of wrongdoers, does not show any consistent pattern or trend. Of fifty jurisdictions, including the District of Columbia and Alaska, twenty-two still have the common law rule, at least with respect to personal injuries. Of the twenty-eight jurisdictions which have changed the common law only a few have abolished it entirely. The states of Arkansas, Florida, Illinois, Kentucky, Maryland, North Carolina, Oklahoma, Pennsylvania and Rhode Island retain the common law rule so far as libel and slander are concerned. Florida, Kentucky and Oklahoma retain it for malicious prosecution. Florida and North Carolina both apply the common law rule to false imprisonment. Illinois, Kansas, Kentucky, Louisiana, Michigan, Virginia, and Rhode Island and others seem to permit the survival of a cause of action for personal injuries to the executor of the injured person only when the injury does not give rise to a cause of action under the Death Statute.

On the other hand, Indiana seems to except from the common law rule only the causes of action for seduction, false imprisonment and malicious prosecution, and Washington seems to permit survival only to executors of injured persons, but not against executors of wrongdoers. Annotated Indiana Statutes (Burns) 1933, ch. 4, §§2-401, 2-402; *Bortle* v. *Osborne,* 155 Wash. 585 (1930). Connecticut will not permit the survival of a cause of action in any event where the dead party is necessary for the prosecution or defense. General Statutes of Connecticut (1930), Vol. II, ch. 321, §6030.

England, which amended its laws in 1934, retains the common law rule for defamation, seduction and offenses

against the marital relationship. *Supra,* 48 Harv. Law Review, 1008 at 1010.

The present legislative situation, together with citations of the relevant statutes, may be found in 44 Harvard Law Review, 976, 48 Harvard Law Review, 1008, and State of New York Law Revision Commission, First Report, Recommendations and Studies, 1935.

It is apparent that the extent to which a legislature should go in changing the rule of the common law is a debatable and troublesome legislative question. At present, it is one of the subjects under study by a committee of the National Conference of Commissioners on Uniform State Laws. Dean Brosman, of Tulane University College of Law, is chairman of the committee.

In the civil law in modern times there have been similar changes in the legal situation with respect to a cause of action for death. The law of France was noted in *The Harrisburg,* 119 U. S. 199, at 212. The law of other continental countries is set forth in Hughes on Admiralty, 2d Edition, pp. 224-227. However, so far as known, there has not been in the civil law any change in the ancient law with respect to the survival of actions to the heirs of the injured person or against the heirs of the wrongdoer. And the quotation which Hughes gives from J. Voet's Commentary on the Pandects, on p. 226, indicates definitely that an action for personal injury still abates on the death of the injured party.

So far as the maritime law is concerned we know from *The Harrisburg, supra,* that there was never a cause of action for the death of a human being. *The Harrisburg* does not say that this was because of the common law. It does say that the maritime law does not differ from the

common law. As will be seen, the language of the Supreme Court was precise and accurate.

So far as concerns the survival of a cause of action for personal injuries, the earliest case in our jurisprudence is *Crapo* v. *Allen,* 6 Fed. Cas. 763. That case was decided in 1849. In deciding it Judge Sprague did not refer to the common law or to the maxim "*actio personalis moritur cum persona*". He cited as authorities Hall, Admiralty Practice, 21, and Dunlap, Admiralty Practice, 87.

Hall's Admiralty Practice was published at Baltimore in 1809 and consists principally of Clerke's Praxis and Hall's commentaries thereon. Clerke's Praxis had been published originally in 1679.

Hall says, at page 22:

> "But we must distinguish between real and personal actions, for all actions that are personal do die with the person: such as are actions or causes for defamation or matrimonial and such like; but in real actions, which may respect the goods, or the right anyone pretends to a personal estate, &c then what is above said takes place."

For his authority Hall appends a note as follows:

> "Inst. Sect. ovum. de Succes. Myns. Grav. ad vest."

This, it is believed, is a reference to two books on the civil law. One is "Mynsinger, Apotelesma Sive Corpus Perfectum Scholiorum ad Quatuor Libros Institutionum Iuris Civilis, Lugdun (Lyons) 1586." The other is "Gravatus, Nic. Ant. Anotationes ad Vestrii Introductionum."* Mynsinger's work, which we have seen, consists of the Institutes of Justinian and Mynsinger's commentaries therein.

---

* Note: For this information we are indebted to Mr. Eldon R. James and Professor James Bradley Thayer, of Harvard Law School.

It is clear, therefore, that the source of the rule for the non-survival of causes of action for personal injury in the maritime law was not the common law at all. Its source was the civil law.

This was only natural. From early times the maritime law regarded the civil law as the source of its rules with respect both to practice and substance. Hall, Admiralty Practice 42; Browne, A Compendious View of the Civil Law and the Law of the Admiralty, London, 1802, 506 to 509, 29, 34, 202, 204 to 207, 407, 409; *Sir Henry Blount's Case* 1 Atkins, 295; 26 Eng. Rep. 189; *Jurado* v. *Gregory,* 1 Vent. 32; 86 Eng. Rep. 23.

This appears also from Dunlap's Admiralty Practice, which was published in 1836 at Boston. This was one of the authorities on which Judge Sprague, in *Crapo* v. *Allen,* relied. The reference in *Crapo* v. *Allen* was to the following paragraph:

> "The death of a party does not in Admiralty necessarily abate the suit. Actions for injuries to the person do not survive to or against the representatives of either party; but actions respecting property survive, and the representatives may become or be required to become parties by a supplemental libel. (Hall's Ad. Practice, 21, 22.) But this does not apply to cases of personal wrongs, which die with the person, as at common law, the maxim of which, *actio personalis moritur cum persona,* is derived from the civil law. (*Pennhallow* v. *Doane,* 3 Dallas 78, 102 (2 Roll. Rep. 18; 2 Lev. 6).)"

Particular attention is called to the distinction evident in the author's mind between the common law and the civil law. The maxim "*actio personalis moritur cum persona*" was a common law maxim, but derived from the civil law. It was only because Dunlap considered that the maritime

rule was also derived from the civil law that he mentioned it at all.

The point is further illustrated by the case of *Penhallow* v. *Doane*, 3 Dallas 54. There the question was raised as to the survival of a cause of action *in rem* when one of the parties died before final decision. No contention was made that the matter was controlled by common law principles but, in the words of Mr. Justice Iredell, at page 101, counsel claimed:

> "That the proceeding in question was a proceeding *in rem*, and upon such proceeding in civil law courts the death of a party does not abate. I incline to think the law is so, but as my opinion is clear on other points in answer to the objection, I avoid giving an opinion on this."

It is true, as the petitioners say in their briefs, that the maritime law has borrowed from the municipal law. As already pointed out, this does not make the municipal law the maritime law. But the petitioners have not observed that in this instance, as in many others, the borrowing was not from the common law but from the civil law.

Again, the petitioners are partially correct when, in copying the words of Mr. Justice Holmes, they say that the maritime law is not a "*corpus juris.*"

If by that is meant that the maritime law has not been developed to the extent of the common law, it is true. But the common law itself did not descend from above. Like the maritime law it developed by borrowing from the civil law.

Perhaps it might be well to express the difference between the two legal systems by referring to the language of Hay, *supra*, page 175, where he says that common lawyers were wont to assume:

> "that somewhere *in nubibus* or *in gremio magistratuum* there exists a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."

On the other hand, maritime lawyers, whose subject was in many respects international, acknowledged their dependence on a body of law, which, for all its faults, could be found in a book.

The very insistence of the maritime law on the survival of actions *in rem* shows that there was a distinction between such actions and actions *in personam*. If it were not so, it would have been a simple matter to explain the survival of causes of action *in rem* on the ground that the maritime law did not provide for the abatement of any actions at all.

But since it was a cardinal principle of the civil law that actions for personal injury did not survive either to or against heirs, the maritime law would have sinned against the logic of its history if it had not followed the same rule.

The dependence which Admiralty Courts placed on the civil law, as opposed to the common law, is also shown by those decisions which are set forth in *The Harrisburg* and which assumed to create a cause of action for the death of a human being. Admiralty judges did this although it was known to them that at common law there was no such cause of action. The result in those cases was reached solely because the maritime law was thought to differ from the common law. It was thought to differ from the common law, in that it had as its source not only the civil law but the modifications of the civil law as contained in the modern law of continental countries. Compare the remarks of Judge Hughes in *The Manhasset*, 18 Fed. 918, at 928.

But for this insistence that the maritime law could create a liability for the death of a human being, *The Harrisburg* would never have been decided. All that *The Harrisburg* decided was that the maritime law, like the common law, must await the action of Congress.

The need for a change in the law with respect to the death of a human being was far more pressing when *The Harrisburg* was decided than the need today for a change in the law with respect to abatement of actions for personal injuries. The rule of *The Harrisburg* that such matters are for Congress is therefore peculiarly appropriate to the case at bar.

To sum up, the maritime law comes by its rule with respect to the abatement of causes of action *in personam* for personal injury by a far better chain of title than the common law ever had. Even the survival of the *in rem* proceedings which, incidentally, was copied from the civil law, has its roots in the civil law itself.

It is in the light of these original sources of the maritime law that subsequent decisions and remarks of judges must be viewed.

Particular reference is made to the decision of Judge Knox in *In re. Statler,* 31 F. (2d) 767, and to that passage in his opinion, at page 769, where he says that the claims for death were subject "to the application of the law that is here administered" Cf. Main Brief, pp. 10-11. It also illuminates the language of Mr. Justice Cardozo in *Cortes, Administrator* v. *Baltimore Insular Lines, Inc.,* 287 U. S. 367 (1932), where he said at page 371:

> "Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land."

It is in the light of the above history that petitioners' erroneous thesis should be viewed. They say on page 8 of their supplemental brief that the decision below is contrary to and in conflict with former decisions of this court. It is in the light of this history that one should place petitioners' erroneous statements that the law of abatement has never been peculiar to the maritime law as administered by nations generally, that there was no special maritime law with respect to abatement in the maritime law of the United States, and that the maritime law, in the absence of a statute, followed the common law, through slavish acceptance of the maxim *"actio personalis moritur cum persona."*

It is in the light of history that one should place the cases cited by the petitioners both in this court and in others. It will then be clear that all of these cases were cases dealing with an action to recover damages for death and were not cases where the courts were concerned with the survival of causes of action for personal injury.

For example, the cases which came up from Louisiana, namely, *The Corsair,* 145 U. S. 335, *The Albert Dumois,* 177 U. S. 240, and *Quinette* v. *Bisso,* 136 Fed. 825, (certiorari denied) 199 U. S. 606, could not have been brought to recover anything except damages for the death of a human being, for, notwithstanding what is provided by the Civil Code of the State of Louisiana, the Louisiana courts have held that only a single tort arises out of the death of a person and that the surviving heirs cannot maintain an action for death plus an action for pain and suffering. *Norton* v. *Crescent City Ice Manufacturing Co.,* 178 La. 135.

The essence of petitioners' argument, as expressed at pp. 21 and 29 of their supplement brief, is as follows:

> "There is no distinction between a death act and a survival statute insofar as concerns the abolition of the common law rule '*actio personalis moritur cum persona*' and the effect of such statutes upon the maritime law."

It is submitted that, in the light of history, this does not seem relevant to the matter under consideration.

A more relevant analysis of the problem will be found in a note in 40 Columbia Law Review, 1434 (1940), where the writer, who, evidently, is not in sympathy with the result reached in the court below, marshals the law and ends with the conclusion that existing law should be ignored by saying that it does not exist and that new principles should be laid down. Respondent does not agree with a number of that writer's remarks, but submits the note to this court as a clear presentation of the principal issues involved.

Moreover, judging from the remarks on page 41 of their supplemental brief, one might also conclude that the petitioners also wish to have this court change the law if the court does not agree with their contention that it has been changed already by the law of Florida.

The Circuit Court said that, if any change is to be made, it is for Congress to make it. That, we submit, is the issue.

No doubt many modern judges do not like the ancient common law rule or the civil law rule providing for the abatement of causes of action for personal injuries. Many may think that those rules are expressive of an outworn policy. That may be. But it would seem that, if this is so, it is for Congress to act. It is for Congress to say just what the policy should be. As already indicated, the policy of the law in this respect is the subject of serious study at the present time by a body whose purpose it is to encourage wise and uniform legislation.

While there is a general opinion that some changes should be made, there are different views as to just what these changes should be. Actions for libel and slander are in disfavor. Florida is such a state. Compiled General Laws of Florida §4211. Missouri, which was the state of residence of the petitioners, will not permit the survival of actions for either slander, libel, assault and battery, false imprisonment or injury to the person. Missouri Statutes Annotated 1932, §§98, 99. Connecticut provides that there shall be no survival of any action where the prosecution or defense depends on the continued existence of the persons who are plaintiffs or defendants. General Statutes of Connecticut, 1930, Vol. II, Ch. 321, §6030. Such a provision would have been very helpful to the defense of the case at bar, where the host was not available to deny the imputation of negligence or assist in the production of evidence.

Under such circumstances it is submitted that the question of change is one primarily for a legislative body, which is in a position to make rules appropriate to the diversity of circumstances and interests involved.

Whatever one may think of the justice of the result below, there is no social need which calls for the intervention of this court, out of the ordinary course, in an isolated case. And, so far as justice is concerned in a particular case, respondent submits that the interests of an executor defending the deceased and his estate from charges of negligence brought by two persons who did not choose to come to court and whose case is based on an imputation of knowledge to a dead man, who was their host, are entitled to sympathetic protection against a liability without limit.

Moreover, whatever may be the need to change the common law by statute, there is not the same need for changing the maritime rule by statute or otherwise. Almost

always a right *in rem* arises when a tort is committed. Under maritime principles this survives. In most cases the value of the vessel is sufficient to pay the damages. It is only petitioners' hope for a larger award that prompts this petition.

It is to be noted in this connection that the District of Columbia itself, which has the immediate attention of Congress, retains the common law rule in all its vigor. District of Columbia Code (1930), Title 24, Ch. 2, §31. *Woolen* v. *Lorenz*, 98 F. (2d) 261. So does Alaska, whose laws must be submitted to Congress for approval. Compiled Laws of Alaska, 1933, Ch. 104, §3843.

As already pointed out in our main brief, Congress in the Death on the High Seas Act, had before it the question whether a cause of action for personal injuries happening on the high seas should survive the death of the injured person, and Congress deliberately provided that such a cause of action should not survive. Instead, Congress gave a new cause of action to survivors on account of the death.

It was so held in *Pickles* v. *F. Leyland & Co.*, 10 F. (2d) 371, at 372.

The petitioners say that the Death on the High Seas Act, unlike the Employers' Liability Act, was not an expression by Congress of a comprehensive policy and they point to the reservation of a restricted legislative competence to the states within territorial waters. But it is to be observed that this circumstance does not lend any force to the argument. On the contrary, it lends force to the contrary conclusion, for it appears that the only matters which are reserved to the states within territorial waters are state legislation with respect to giving or regulating rights of action or remedies for death. Such statutes certainly have nothing to do with the survival of a cause of action for per-

sonal injury against the executors of a deceased wrongdoer, or, for that matter, to the executor of a deceased injured person.

This very limitation on the orbit of state legislation emphasizes the comprehensiveness of the Congressional policy, which, it may be observed, was expressed in the act itself when it specifically provided that causes of action for personal injury should not survive the death of the injured person. *Hines, et al.* v. *Davidowitz & Travaglini*, ... U. S. ....., decided January 20, 1941. That expression of legislative intent required the continuation on the high seas of what had always been the maritime law, not only on the high seas, but on all navigable waters. The silence with respect to territorial waters cannot be taken to mean that Congress wishes the law there to be changed. For, if that had been so, it would have reserved to the states the power to change the law. Since it did not do so, the silence must indicate an intention that the law with respect to survival shall continue as before, alike on the high seas and in territorial waters. That might be expected of a Congress bent on making the law as uniform as possible.

For the reasons contained in Point I this Court should reverse the decree which at present stands against the vessel *in rem*, and should dismiss the petitioners' claims. For the reasons mentioned in Point II the Court should, if it does not dismiss the petitioners' claims, affirm the decree of the Circuit Court of Appeals.

Respectfully submitted,

Raymond Parmer

Vernon S. Jones

New York City,
Proctors for Respondent.